

UNITED STATES

v.

JERRY L. CROW

IBLA 76-766 Decided January 24, 1977

Appeal from a decision of Administrative Law Judge E. Kendall Clarke rejecting trade and manufacturing site application to purchase F-533.

Affirmed as modified.

1. Alaska: Trade and Manufacturing Sites

A trade and manufacturing site application is properly rejected when there is only a cabin on the site, roads and clearing for a campground and the land has been used intermittently for campsite rentals, only a few people used the campsites during the life of the claim, and any revenues which were derived or could have been derived from use of the site as a campground would not be such as to engender the belief that appellant was engaged in a productive industry or that he hopes to garner a profit from operation of a business.

2. Rules of Practice: Generally—Rules of Practice: Government Contests

The fact that the contest regulations may not contain a specific provision providing for the assertion of affirmative defenses or counterclaims in an answer to a contest complaint does not necessarily bar an Administrative Law Judge from consideration of the substance of such assertions.

APPEARANCES: Thomas P. Blanton, Esq., Fairbanks, Alaska, for appellant;
James R. Mothershead, Esq., Office of the Solicitor, Department of the Interior, Anchorage, Alaska, for the Government.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

On June 20, 1967, Jerry L. Crow filed a notice of location of settlement or occupancy for a trade and manufacturing (T&M) site in unsurveyed section 6, T. 22 S., R. 3 E., Fairbanks Meridian. He gave the date of settlement as March 24, 1967. The desired use for the site was listed as "housekeeping cabins and campground." The Bureau of Land Management (BLM) mailed Crow a notice of claim acknowledgment dated August 4, 1967.

On May 17, 1972, Crow filed an application to purchase the site claiming various improvements.

On November 14, 1974, BLM initiated a contest against the T&M site charging that (1) the "Contestee is attempting to acquire the land for a prospective commercial campground" and that (2) "The contestee failed to make a good faith attempt to prove up on his claim in the manner required by the Federal land laws * * *."

A hearing on the contest complaint was held on June 26, 1975, in Fairbanks, Alaska.

By decision dated July 22, 1976, Administrative Law Judge E. Kendall Clarke in rejecting the application cited two reasons: (1) "less than half the area was occupied by any improvements" and (2) "campground rental was such a de minimis activity that it cannot be considered to be the productive industry contemplated by statute; it simply is not a bona fide commercial enterprise from which one could hope to derive a profit."

The application was made pursuant to section 10 of the Act of May 14, 1898, 1/ as amended, 43 U.S.C. § 687a (1970), which provided in pertinent part:

Any citizen * * * in the possession of and occupying public lands in Alaska in good faith for the purpose of trade, manufacture, or other productive industry, may * * * purchase one claim * * * upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry * * *.

Section 5 of the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1970), requires that applications to purchase, along with the required proof, must be filed within 5 years after the filing of the notice of claim.

1/ This statute was repealed by sec. 703(a) of P.L. 94-579, 90 Stat. 2789-2790, on October 21, 1976, the repeal to be effective as of 10 years from October 21, 1976.

The regulations, 43 CFR 2562.3(d)(1), state that the application must show:

That the land is actually used and occupied for the purpose of trade, manufacture or other productive industry when it was first so occupied, the character and value of the improvements thereon and the nature of the trade, business or productive industry conducted thereon and that it embraces the applicant's improvements and is needed in the prosecution of the enterprise. A site for a prospective business cannot be acquired under section 10 of the act of May 14, 1898 (30 Stat. 413; 43 U.S.C. 687a).

Appellant's T&M site is located at mile 68 on the Denali Highway (Ex. 38). The site is not accessible in the winter as the road usually closes in October and does not open until June (Tr. 74). There is a road constructed by BLM traversing the claim and connecting with Denali Highway (Tr. 79; Ex. 38).

Appellant began improving the site in 1968 when he purchased a "Rustic Craft" log cabin and had it constructed in the northwest portion of the site. The total cost for the cabin and the construction was \$3,000. The cabin served as both a cabin and an office (Tr. 76-78). Appellant also had a survey conducted. He paid the surveyor \$100 and allowed him to use the cabin during hunting season (Tr. 79).

A previous applicant for the same T&M site had made most of the road improvements which consisted of short graveled spur roads leading from the BLM road. Campsites were located at the termini of the spur roads (Tr. 79; Ex. 37). The campsites consisted of a cleared area of sufficient size to place a picnic table, a ring of rocks for a fire, a trash can, and an area for a tent. Two out-houses were constructed and water was provided from a stream which passes through the site.

Appellant stated that some of the improvements were constructed in 1970, but that "the greatest amount of improvements were done in 1971" (Tr. 80). Appellant testified that the cabin was rented to a man for June and July of both 1970 and 1971 and June of 1972. The rental was \$150 per month or a total of \$750 (Tr. 80).

Appellant opened the camping business around June 15, 1971, charging campers \$1.00 per night for a campsite. He had an employee who tended the campground. In return the employee received room (cabin) and board (groceries provided by appellant) and also the employee was allowed to keep the camping fees (Tr. 86-87). Appellant visited the site approximately every 2 weeks, delivering groceries and building supplies (Tr. 85).

A guest register filed by appellant with his application to purchase showed 12 campers or groups of campers used the site from August 22, 1971, through September 4, 1971, and 12 more from July 3, 1972, to August 21, 1972. Appellant stated that the register was not signed by all guests of the campground and that the register was not meant to be a record of income (Tr. 92). Appellant admitted that some of the campsites were never used (Tr. 90).

Appellant stated that total operating expenses of the camp for 1971 and 1972 were \$1,200 each year (Tr. 112).

The T&M site was examined in June 1973 by Rick Tevebaugh, realty specialist for BLM. Tevebaugh was accompanied by appellant. In his land report (Ex. 38) dated September 9, 1973, Mr. Tevebaugh concluded:

Mr. Crow has obviously expended a fair amount of money in developing this operation, primarily in the cabin or office; however, it is not believed that the law can be interpreted to encompass an operation so infrequently used by customers and so unproductive of gross receipts as a business such as this (Re. James E. Allen A-30085 decided Feb. 23, 1965).

In view of the fact that Mr. Crow has failed to show that he has conducted a real commercial operation on the land, it is recommended that this case, F-533, be rejected in its entirety.

Due to the death of Tevebaugh prior to the hearing another BLM realty specialist, John Dolak, conducted an examination of the site on June 13, 1975 (Tr. 10). Dolak found essentially the same improvements as those outlined by Tevebaugh in his report (Ex. 38). Dolak's conclusion was the same as that of Tevebaugh (Tr. 13).

There is no dispute that appellant expended money in establishing a campground, nor is there any dispute over the type and extent of improvements constructed by appellant. The real question presented centers around the nature of the actual business conducted by appellant.

As an applicant for patent to public land under the trade and manufacturing law, appellant has the burden of showing compliance with the law and regulations. See Lynn E. Erickson, 10 IBLA 11, 80 I.D. 215 (1973); Lee S. Gardner, A-30586 (September 26, 1966).

Appellant argues that the lack of improvements on part of the site was not an issue in the contest and is not a reason to reject the application to purchase. Appellant overlooks the fact that Section 10 of the Act, supra, limits the right to purchase a tract of land in Alaska under the T&M site law to that land actually

occupied and used for such a site. Lloyd Schade, 12 IBLA 316 (1973); Golden Valley Electric Association, 8 IBLA 386 (1972). The Administrative Law Judge found that less than half the site was actually occupied with any improvements. In fact, appellant admitted that he had no improvements east of the BLM road traversing the site. (Tr. 101). Therefore, as to those lands east of the BLM road, the application to purchase was properly rejected as containing no improvements.

The question left for resolution is whether appellant actually established a business and used the remainder of the site adequately for business purposes under the T&M site law.

[1] The Department has interpreted the T&M site law to require that the applicant show at the time application to purchase is filed, that he is presently occupying land for business purposes, that the land presently contains improvements and that it is presently needed for conduct of the existing business. Carl A. Bracale, Jr., A-31149 (April 20, 1970). It is clear that a site for a prospective business cannot be acquired under the T&M site law. 43 CFR 2562.3(d)(1). The Department held in Hershel E. Crutchfield, A-30876 (September 30, 1968), that to make the showing called for by the statute and regulations:

* * * there must be evidence from which it can be concluded that an applicant is engaged in a bona fide commercial enterprise from which he hopes to derive a profit. It is not necessary to show that a profitable operation has been developed, but there should be evidence of an investment of such a nature that a reasonable return could be expected. The receipt of a few dollars over a period of years does not satisfy these criteria. See James E. Allen, A-30085 (February 23, 1965).

In Allen, *supra*, the Solicitor stated:

We do not mean to imply that a modest operation or even an unprofitable one would necessarily fail to qualify under the trade and manufacturing site law. That law does not require the existence of a full-blown enterprise before a patent can issue. We do not believe, however, that the law can be interpreted to encompass an operation so infrequently used by customers and so unproductive of gross receipts as the business operated by the appellant here during the life of his claim.

The fact that Allen has expended some \$2,200 in improvements on the tract does not in itself establish that his venture was commercial. Much of the improvements – construction of the airstrips, etc. – would have been essential for purely personal use of the field. He has made no showing as to how much of his investment was made as a business proposition to be recovered from returns from his operations. This is not to say that he was required to make such a showing but a showing of a reasonable investment from which a reasonable return could be expected would have been evidence in support of the contention that he had established a business operation.

To establish a right to land under the public land laws, the applicant is required to support his assertions with evidence which is in his sole control. United States v. Block, 12 IBLA 393, 80 I.D. 571 (1973).

Herein, appellant failed to provide any concrete evidence as to revenues derived from the campground. The guest register indicates only a few overnight campers for both 1971 and 1972, even though appellant asserts that there were numerous others. The income derived from camping fees went directly to the employee overseeing the campground. Appellant produced no record of the total amount of camping fees received. Appellant did testify that the cabin/office was rented for \$750; however, the rental of the cabin/office apparently bore no relation to the campground business.

Appellant has failed to establish that he was engaged in a productive industry during the life of his claim. While it is true that appellant need not show that a profitable operation has been developed, there must be evidence of a bona fide commercial enterprise from which appellant hopes to derive a profit. With only seven or eight campsites and a \$1.00 overnight camping fee, even assuming all the campsites were rented every night, appellant could not reasonably expect to derive a profit from the operation considering his expenses and initial investment.

Viewing the evidence in the light most favorable to appellant, any revenues which could have been derived from the site as a campground would not be such as to engender the belief that appellant was engaged in a productive industry.

Having found that appellant's activity on the site was of such a limited nature as not to meet the T&M site law requiring a productive industry, we need not decide the question of whether a campground site alone would be a sufficient business to constitute a "productive industry." Jay Fredrick Cornell, 4 IBLA 11 (1971),

aff'd, Cornell v. Morton, No. 73-1930 (9th Cir., September 3, 1974); cf. Seldon H. Klink, 7 IBLA 83 (1972).

The Administrative Law Judge made the following statement concerning the affirmative defenses and counterclaim in his decision:

Since there is no provision for affirmative defenses or counterclaim in the regulation under which the contest is brought, no specific rule is made regarding those matters contained in the Answer.

While appellant couched his responses in the answer in terms such as "affirmative defenses" and "counterclaim," the assertions which he made do not fit neatly into such categories. Even though there may be no specific provision for affirmative defenses and counterclaims, the fact that a certain nomenclature was used should not necessarily bar the consideration of the substance of the arguments made by appellant.

Appellant has cited as error on appeal the failure of the Administrative Law Judge to rule in appellant's favor on certain affirmative defenses and the counterclaim.

We note that appellant raised his "counterclaim" at the hearing and that the Administrative Law Judge treated it as a motion to dismiss and denied the motion at that time (Tr. 3-5). Appellant's assertion that the Government was guilty of laches in the delay in processing the application and initiation of the contest must fail in the face of 43 CFR 1810.3(a) which reads:

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or agents, or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

While the delays referred to by appellant were unfortunate, they were not such as to encumber appellant in establishing a productive industry on the site during the statutory life of his claim.

As to the "affirmative defenses" appellant contends the Administrative Law Judge failed to rule upon in appellant's favor, i.e., the first and third, set forth supra, the complaint was not so vague as to fail to put appellant on notice. The two charges in the complaint were sufficient to notify appellant that his claim was being contested for the reasons stated in the charges.

In addition, that BLM may have admitted that appellant's application was acceptable on its face does not relieve appellant of the burden of showing that he has complied with the statute and regulations before patent may issue. See Lynn E. Erickson, supra. The contest was brought to determine whether the prima facie showing on the application could be substantiated. In any event, we need not decide whether there was even an adequate prima facie showing since the application indicated "campground" as the business and, as previously indicated, we need not decide whether that is a sufficient business within the meaning of the Act.

The other "affirmative defenses" in appellant's answer were, in effect, disposed of by the conclusion of the Administrative Law Judge in his decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Frederick Fishman
Administrative Judge

We concur.

Douglas E. Henriques, Administrative Judge

Joan B. Thompson
Administrative Judge

